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Special Master George Finkle

BEFORE THE INSURANCE COMMISSIONER
OF THE STATE OF WASHINGTON

In the Matter of the Application
regarding the Conversion and
Acquisition of Control of Premera Blue
Cross and its Affiliates.

No. G 02-45

PREMERA'S SUBSTANTIVE
RESPONSE TO THE WSMA'S
REQUEST FOR AN EMERGENCY
HEARING RE DISCLOSURE OF
ATTORNEYS' EYES ONLY
MATERIALS

INTRODUCTION

Premera objects to the request by the attorneys for the Washington State Medical Association ("WSMA") that they be permitted to provide Dr. Jeff Collins and Mr. Robert Perna with those portions of the draft and final OIC Staff's Consultant Report (collectively, the "Consultant Reports") that have been designated by Premera as "Attorneys' Eyes Only" (collectively, "AEO Materials").

There are a number of reasons why the Special Master should deny the WSMA's request. First, by the very nature of the AEO designation, a client is deemed not to be able to see materials that its attorneys can see, and the WSMA's attorneys have not contested any of the AEO designations in the Consultant Reports. Second, there is a question as to whether Dr. Collins and Mr. Perna are actually expert witnesses. Third, even if they are

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1 deemed to be experts, it is not appropriate for them to obtain AEO Materials. Fourth,
2 there was no showing by the WSMA that there was any need for these two individuals to
3 have access to the AEO Materials in the Consultant Reports in order for them to prepare
4 their reports or to testify on the subject for which the WSMA has been permitted to
5 intervene: "reimbursement levels to providers from Premera, which could have an effect
6 on the adequacy of providing networks serving the insured public."¹ Fifth, the WSMA
7 has not attempted to request that certain specific AEO Materials in the Consultant Reports
8 be provided to the experts; rather, it is requesting a wholesale turnover of all AEO
9 Materials in those reports to its President and chief economic analyst.²

10 Finally, if the Special Master determines that these individuals are experts and that
11 Premera would normally have the burden of proof on the "appropriateness" issue and if,
12 because of that burden of proof, he is inclined to permit disclosure of some or all of the
13 AEO Materials to these individuals, the Special Master should, in this case, rule that the
14 burden of proof is on the WSMA or, in the alternative, he should permit Premera to
15 conduct the discovery it has requested.³ Otherwise, Premera is being unfairly precluded
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18 ¹ This role for the WSMA was established in the Commissioner's Fourth Order.

19 ² In regard to these first five reasons, it would be unfair for the WSMA to be allowed to
20 belatedly create or supplement a record in its November 3rd Response regarding whether
21 these individuals are experts, why they need the AEO Materials, and which specific
22 materials are needed; and Premera objects to the WSMA attempting to do so in its
November 3rd Response. Indeed, it is noteworthy that WSMA's original Emergency
Motion and its Reply to Premera's Procedural Response are devoid of any supporting
declarations. Instead, we have only the unverified assertions of its counsel, which
assertions Premera moves to strike.

23 ³ One of the justifications for transferring the burden of proof is that the WSMA's failure
24 to timely make its request for disclosure of AEO Materials to these individuals has itself
created whatever time crisis now exists.

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1 from obtaining evidence to meet its burden of proof -- evidence for which it made a
2 timely request.

3 SUPPORTING EVIDENCE

4 In support of its Substantive Response, Premera submits the accompanying
5 Declaration of Kent Marquardt ("Marquardt Declaration"), the Chief Financial Officer of
6 Premera.

7 MOTION TO STRIKE WSMA'S FACTUAL ASSERTIONS

8 Premera hereby moves to strike all factual assertions in WSMA's Emergency
9 Motion and its related pleadings, since they were unsupported by any declaration.

10 ARGUMENT

11 1. The nature of the AEO Designation

12 The whole point of an "attorneys' eyes only" designation is that, contrary to
13 confidential information -- which can be shown to the attorneys' client and its officers
14 and employees -- "AEO Materials" is for the eyes of the attorneys only and cannot be
15 shown to the client or its officers or employees.

16 The AEO designation is a practical rule which recognizes that a person cannot
17 divide his/her brain in half, nor can he "unring the bell" once he/she reads documents that
18 may be of competitive or economic advantage. And it is a prophylactic rule, recognizing
19 that it would be very difficult, and often impossible, for the party whose AEO Material is
20 disclosed to prove at a later point in time that the brilliant strategic or economic move that
21 the recipient of the AEO Material made at that later time was not due to the natural genius
22 of the recipient but to his/her access to AEO Material. Since we are all interested in
23 maintaining trade secrets, while at the same time permitting proper discovery, the law has
24 established the approach of permitting only the lawyers to look at sensitive material.

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1 It is important to emphasize that, in deciding this motion, the Special Master does
2 not have to reach the question of whether Dr. Collins or Mr. Perna would intentionally
3 disclose or misuse Premera's proprietary information and trade secrets. Rather, the point
4 is that there is no way that they can compartmentalize this information, so as to ignore
5 what they have learned. Nor is there any justification for Premera having to take the risk
6 of misuse of the information and trade secrets.

7 In this case, it is undisputed that Dr. Collins is an officer and a member of WSMA
8 and that Mr. Perna is an employee of that organization. According to WSMA's Reply, Dr.
9 Collins has a very active practice in Spokane and is "a member of Eastern Washington's
10 largest internal medicine practice." While we are not suggesting that Dr. Collins would be
11 untrustworthy, it would be the height of naiveté to believe that Dr. Collins -- or anyone
12 else who sees the AEO Materials -- will be able to forget what he saw wearing his
13 expert's hat when he has his negotiating hat on.

14 Dr. Collins and the other doctors in his physicians group are participating
15 providers in Premera's provider network. It would be to their competitive and economic
16 advantage -- both in negotiating with Premera and in negotiating with other insurance
17 companies -- to know the information about the business plans and economic analyses
18 that can be found in the AEO Materials in the Consultant Reports. Moreover, Dr. Collins,
19 in his role as President of WSMA, would be able to utilize this information to more
20 effectively represent the competitive and economic interests of WSMA and its members
21 in its dealings with Premera, with other insurance companies, with hospitals and with the
22 legislature.

23 It appears that Mr. Perna's job is to provide reports and strategies to the WSMA
24 about health care economics and to be an advocate for physicians. The Special Master

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1 can take judicial notice of the fact that, for Mr. Perna to be effective in his job, he must
2 prepare insightful and fact-specific reports to the WSMA and its members and he must be
3 a knowledgeable advocate. If Mr. Perna were to get access to Premera's AEO Materials,
4 he would be able to write more insightful and fact-specific reports and he would be that
5 much more knowledgeable and effective an advocate. Again, we are not questioning his
6 trustworthiness. But inevitably his knowledge of Premera's AEO Materials would give
7 WSMA an unfair advantage in its dealings, and in its members' dealings, with Premera.

8 2. There is no reason to believe that Dr. Collins
9 and Mr. Perna are expert witnesses.

10 While Dr. Collins is an experienced internist, the WSMA did not even submit any
11 unverified evidence that he was an expert in the area for which he would be called --
12 "reimbursement levels to providers from Premera, which could have an effect on the
13 adequacy of providing networks serving the insured public." If he only has anecdotal
14 evidence of his or his group's personal experiences with reimbursement levels, he would
15 not be qualified to speak generally about the situation in the State of Washington.
16 Ironically, the more that he is shown to have the broader knowledge needed to be an
17 expert, the less he needs to see Premera's AEO Materials in order to give an opinion on
18 the subject and, at the same time, the more troubling it is for him to have access to
19 Premera's data, given the impossibility of his compartmentalizing that data.

20 The WSMA has also left all of us in the dark as to whether Mr. Perna has
21 knowledge about reimbursement levels and what that knowledge is. He may well have
22 obtained this information from the WSMA's members or from his research in other areas
23 and he may well have sufficient information from his own sources to prepare his report
24 and to testify effectively. If so, Premera submits that any need that he might claim for
25 additional data on the subject is greatly outweighed by the fact that he would not be able
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1 to compartmentalize whatever information on physician reimbursement or other financial
2 data he obtains from the AEO Materials. Access to those materials would thus result in an
3 advantage in furthering the WSMA's own interests, both in reimbursement levels and in
4 other aspects of health care economics as it affects its members.

5 Again, the Special Master does not have to rule at this time as to whether or not
6 the WSMA can eventually establish that these individuals are experts who can submit
7 reports and testify at the Conversion Hearing. For now, however, the WSMA has failed to
8 establish that they are experts for purposes of qualifying initially under the Protective
9 Order to see AEO Materials.

10 If they are not so qualified, then the Protective Order shifts the burden to the
11 WSMA to prove: "(a) that the party seeking to disclose the information to the particular
12 person has a compelling reason to do so and (b) that such reason is not outweighed by the
13 danger that, in disclosing the Attorneys' Eyes Only Information to that person, there is a
14 risk that the designating party or a third party would be harmed." Protective Order at page
15 7, Paragraph 3(b)(ii)(3). And it is very clear that the WSMA's motion is devoid of any
16 proof on either of these elements.

17 3. Even if Collins and Perna are experts, it is not appropriate
18 for them to obtain Premera's AEO Materials.

19 WSMA has not disputed that those portions of the Consultant Reports marked as
20 AEO Materials have been properly so designated.

21 By definition, then, the materials at issue are "information that derives economic
22 value, actual or potential, from not being generally known to, or not being readily
23 ascertainable by proper means by, other persons who can obtain competitive advantage or
24 economic value from its disclosure or use." Protective Order at page 7, Paragraph 1(b).

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1 As we have explained above, the WSMA, its members, Dr. Collins, Dr. Collins'
2 group and Mr. Perna -- all can obtain competitive advantage and/or economic value from
3 its disclosure or use.

4 Webster's New Collegiate Dictionary (1973) defines "appropriate" as "especially
5 suitable or compatible." Under that definition, giving Premera's AEO Materials would be
6 especially unsuitable and incompatible. Unsuitable because the leaders of one of the
7 building blocks in the health care payment system -- the physician providers -- would
8 have access to information and data about Premera's budgets, projections, business plans
9 and financial analyses. It is not in the interest of the public for the physician providers to
10 have this information. Providing Premera's AEO Materials to the WSMA would be
11 incompatible with the checks and balances that exist in a competitive system, where the
12 providers don't have access to the insurers' proprietary financial information and the
13 insurers don't have access to the providers' proprietary financial information.

14 So, even if these individuals are deemed to be experts and even if Premera has the
15 burden, the Special Master should conclude that it is inappropriate for them to have access
16 to Premera's AEO Materials.

17 4. WSMA failed to show any need for Collins and Perna to have
18 Premera's AEO Materials in order to prepare reports and
testify on WSMA's intervention topic.

19 The Commissioner's Fourth Order defined the particular interest that constituted
20 the ground upon which the WSMA obtained intervenor status: it was authorized to raise
21 its concern about "reimbursement levels to providers from Premera, which could have an
22 effect on the adequacy of providing networks serving the insured public."

23 WSMA has failed to establish that it cannot adequately raise its concern about
24 such reimbursement levels through use of the data that is in the possession of those of its

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1 members who are providers in the Premera system or use of the data that it has collected,
2 through the work of Mr. Perna and others.⁴

3 5. WSMA has not identified which specific AEO Materials
4 should be turned over to Collins and Perna.

5 There are seven Consultant Reports. The subject of one of them is executive
6 compensation. Two of the other reports deal with anti-trust issues; two deal with
7 accounting and tax issues; another is an analysis provided by an investment banking firm;
8 yet another is a legal analysis. Why should Dr. Collins and Mr. Perna see the AEO
9 Materials in any of these reports? Simply put, the WSMA failed to demonstrate why it
10 needed what it's asking for.

11 It is too late for the WSMA, now that we have pointed out some of the deficiencies
12 in their motion, to try to construct reasons for these witnesses to see any of the AEO
13 Materials in the Consultant Reports. In addition to violating the requirement that opening
14 motion papers include the evidence in support of its request, Premera would only have one
15 day, under the Special Master's October 29th schedule to try to refute evidence that the
16 WSMA would have kept to itself until it files its Response Brief on November 3rd

17 6. If the Special Master is considering permitting disclosure of some or all of
18 Premera's AEO Materials, he should put the burden on WSMA and, if he
feels they are meeting the burden, he should permit Premera to conduct
discovery before he rules.

19 If the Special Master determines that these individuals are experts and that
20 Premera would normally have the burden of proof on the "appropriateness" issue and if,
21 because of that burden of proof, he is inclined to permit disclosure of some or all of the

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23 ⁴ In order to obtain details as to the extent of the data in the possession of the WSMA and
24 Dr. Collins and Mr. Perna, Premera served the WSMA with a Second Set of Requests for
Documents to which, as of the date of the filing of this Response, WSMA has failed to
respond.

1 AEO Materials in the seven reports to these individuals, the Special Master should, in this
2 case, rule that the burden of proof is on the WSMA or, in the alternative, he should permit
3 Premera to conduct the discovery it has requested. Otherwise, Premera is being unfairly
4 precluded from obtaining evidence to meet its burden of proof -- evidence for which it
5 made a timely request.

6 Rather than trying to decide in the abstract whether these individuals can or cannot
7 write their expert reports, let them submit their reports on November 10th and also let
8 Premera obtain its discovery and take their depositions. The parties can then re-brief this
9 issue and the Special Master will have the benefit of the facts in making his ruling. If the
10 Special Master then decides to disclose any AEO Materials in the Consultant Reports, he
11 will at least have taken steps to err on the side of not unnecessarily releasing trade secrets.

12 The alternative is to rush to release proprietary information, the harm from which
13 cannot be undone.

14 7. Response to the Arguments made by the WSMA
15 in its Reply to Premera's Procedural Response.

16 The WSMA's Reply to Premera's Procedural Response makes a number of
17 arguments, none of which are compelling to the issue at hand: why the client's
18 representatives should be permitted to see the AEO Material in the OIC Consultant
19 Reports.

20 The first argument is that Dr. Collins and Mr. Perna can be trusted not to use the
21 AEO Material to competitive advantage or to economic advantage. We are not
22 questioning the trustworthiness of these men. But the WSMA's argument proves too
23 much: it says that any client can be trusted not to misuse AEO Material, so there is no
24 need for the AEO category. Human nature says otherwise.

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1 The next argument is an unverified assertion that the WSMA is too poor to afford
2 to hire an expert. Suffice it to say that Premera is highly skeptical of that assertion and
3 would like to do discovery on the point.⁵

4 The next argument is a *non sequitur*: Premera didn't object to the other
5 Intervenor's experts, therefore it shouldn't object to the WSMA's. Perhaps Premera's
6 position on the other experts has something to do with the fact that they are not officers or
7 employees of the other Intervenor's.

8 The next argument questions some of Premera's Second Set of Document
9 Requests. One complaint is that Premera did not ask for documents relating to the
10 trustworthiness of the WSMA's experts. The reason is that we are not questioning their
11 trustworthiness. But we are questioning their ability -- indeed, anyone's ability -- to
12 compartmentalize this highly sensitive data.

13 The WSMA also tries to argue that it should not have to provide some of the
14 documents that were requested in discovery. Since the Special Master gave the WSMA
15 the right to raise such objections in its upcoming brief, Premera will await its own reply
16 brief to respond, other than to say that the standard for discovery -- that the requested
17 document is "reasonably calculated to lead to the discovery of admissible evidence" -- is
18 very broad. All of Premera's requests fall within that standard.

19 In sum, the WSMA has failed to provide any arguments that would justify
20 providing any of the AEO Materials in the Consultant Reports to these two individuals.

21 ⁵ It is more than a little ironic that the WSMA, while demanding that its top officer and its
22 chief economist see Premera's proprietary financial data, proposes that no one -- neither
23 Premera nor its attorneys -- be permitted to see the WSMA's own economic data
24 regarding its budget and financial resources. See page 2 of the WSMA's Reply. Instead,
the WSMA wants to keep its finances secret from everyone and to only provide it in
camera to the Special Master, thereby making its own data "SMEO" -- Special Master's
Eyes Only.

25 PREMERA'S SUBSTANTIVE RESPONSE TO
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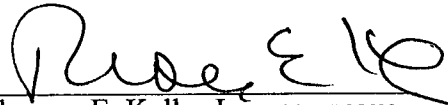
1 CONCLUSION

2 The term "Attorneys' Eyes Only" means what it says: a client and its
3 representatives don't get to see the AEO Materials. One cannot properly get around this
4 limitation by claiming that the client's representatives are also experts. Even if they are
5 experts, they are still the client's representatives and, as such, must perform their expert
6 activities without the benefit of access to AEO Materials.

7 For all of the reasons set forth above, the Special Master should deny the WSMA's
8 motion.

9 DATED this 31st day of October, 2003.

10 PRESTON GATES & ELLIS LLP

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12 By 
13 Thomas E. Kelly, Jr., WSBA # 05690
14 Attorneys for Applicant PREMIERA
15 and Premera Blue Cross
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